

2001

State of Utah v. Brent Timmerman : Brief of Appellant

Utah Court of Appeals

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Dee W. Smith; The Public Defender Association, Inc. of Weber County; Attorney for Defendant/Appellant.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

)

)

Plaintiff/Appellee,

)

vs.

)

BRENT TIMMERMAN,

Case No. 20011022-CA

)

Defendant/Appellant.

BRIEF OF APPELLANT

APPEAL FROM A FINDING OF GUILTY BY A JURY ON NOVEMBER 20, 2001, AND FROM THE COURT'S DENIAL OF THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE. THE DEFENDANT WAS FOUND GUILTY OF POSSESSION OF A CONTROLLED SUBSTANCE, A SECOND DEGREE FELONY, AND POSSESSION OF DRUG PARAPHERNALIA, A CLASS B MISDEMEANOR. IN THE SECOND DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE STANTON M. TAYLOR PRESIDING.

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FILED
UTAH APPELLATE COURTS
NOV 16 2004

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

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Plaintiff/Appellee,

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vs.

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BRENT TIMMERMAN,

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Defendant/Appellant.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
	:	
Plaintiff/Appellee	:	
	:	
vs.	:	
	:	
BRENT W. TIMMERMAN,		Ct. App. No. 20011022-CA
	:	
Defendants/Appellants	:	

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a finding of guilty by a jury on November 20, 2001, and from the Court's denial of the Defendant's Motion to Suppress Evidence. The Defendant was found guilty of possession of a controlled substance, a second degree felony, and possession of drug paraphernalia, a class B misdemeanor. He was sentenced on the same day to an indeterminate term of one to fifteen years at the Utah State Prison and six months in the county jail which were to run concurrent to each other, but consecutive to another prison sentence. On December 18, 2001, the Defendant filed a notice of appeal. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. 78-2a-3(2)(e)(2002).

ISSUE ON APPEAL AND STANDARD OF REVIEW

WAS THE DEFENDANT DETAINED WITHOUT REASONABLE SUSPICION WHEN OFFICER DIXON TOOK HIS DRIVER'S LICENSE AND RAN A WARRANTS CHECK ON HIM?

STANDARD OF REVIEW: The trial court's determination of reasonable suspicion should be reviewed for correctness. *See, State v. Galvan* 37 P.3d 1197, 1198 (Utah Ct. App. 2001). The trial court's factual findings underlying its decision to deny a motion to suppress should be reviewed under a clearly erroneous standard of review. *See, State v. Pena*, 869 P.2d 932, 939 n. 4 (Utah 1994). This issue was preserved when the Defendant's attorney filed a motion to suppress the evidence (R. 021-24).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Fourth Amendment - The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Utah Code Ann. 78-2a-3(2)(e)(2002).- Court of Appeals Jurisdiction-

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first-degree felony or capital felony;

STATEMENT OF THE CASE

The Defendant was charged by Information with possession of a controlled substance with a prior conviction, a second-degree felony, possession of drug

paraphernalia, a class B misdemeanor, and no registration, a class C misdemeanor. (R. 001). Defendant's trial attorney filed a motion to suppress the evidence against the Defendant. (R. 021-24). The State responded with an objection to Defendant's motion. (R. 026-033). A suppression hearing was held in front of the Honorable Stanton Taylor on October 16, 2001. (R. 035). The Defendant's motion to suppress was denied. (R. 041). A jury trial was held on November 20, 2001. The Defendant was found guilty of the charges. (R. 053-54). He was sentenced on the same day as the trial to a term of one to fifteen years at the Utah State prison. (R. 054).

The Sentence, Judgment and Commitment was signed on December 14, 2001. (R. 110-113). A notice of appeal was filed on December 18, 2001. (R. 107).

STATEMENT OF THE FACTS

On August 1, 2001, Justin Dixon, an officer with the Ogden Police Department was on patrol at approximately 3:00 a.m. He noticed a truck that was pulled to the side of the road. The lights weren't on and the door was open. The driver was "kind of half hanging" out the door and he was working on something under the dash. (R. 117/2). Officer Dixon pulled up behind the vehicle. (R. 117/3). He had his high beam headlights on but he didn't activate the overhead lights. (R. 117/4).

Officer Dixon testified that he hadn't observed any violations of the law. (R. 117/3). His reason for stopping behind the Defendant's vehicle was to "see if they were okay, see if they needed any help." (R. 117/4). Officer Dixon spoke with the Defendant who told him that his dash lights had gone out. Officer Dixon could see that Defendant was "messaging with the wires of the fuse box under the dashboard." (R. 117/5).

Officer Dixon had noticed that the vehicle had Iowa license plates. He asked the Defendant where he was from and he answered Huntsville. (R. 117/5). Officer Dixon asked the Defendant who the truck belonged to. The Defendant initially said he didn't know and then he answered that it was a friends. (R. 117/5). The Defendant told Officer Dixon that a friend bought it from a lady and the friend was letting him use it. (R. 117/5). Officer Dixon couldn't remember if the Defendant told him his friend's first name. (R. 117/10). He also couldn't remember if the Defendant gave him a phone number to verify who the owner was. (R. 117/10).

Officer Dixon asked the Defendant for his driver's license and the registration so he could make sure that everything with the truck was okay. (R. 117/5). The Defendant couldn't find the paperwork on the vehicle but he did give Officer Dixon his driver's license. (R. 117/6). Officer Dixon ordered the Defendant to stay in the vehicle while Officer Dixon took the Defendant's license

back to his police vehicle. (R. 117/6). Officer Dixon learned that the vehicle wasn't stolen and that Defendant's license was valid. (R. 117/6). He also ran a warrants check on the Defendant and learned that he had a felony warrant for his arrest. (R. 117/6).

The Defendant was arrested on the warrant. (R. 117/6). Officer Dixon had another officer search the Defendant's vehicle incident to arrest. He also did an inventory of the vehicle before they impounded it. (R. 117/7). During the search of the vehicle, Officer Grogan found three small baggies which tested positive for methamphetamine. He also found some glass pipes and a plastic scale. (R. 117/7). These items were found on the middle of the seat. (R. 117/7). There was a female passenger in the vehicle. She told the officers that the methamphetamine was not hers. (R. 117/8). Officer Dixon then spoke with the Defendant. He told the Defendant that he was going to charge them both with it and that if it wasn't the female's he should tell him so she wouldn't get charged with it. (R. 118/78). The Defendant said "If she doesn't get charged, it's mine. (R. 118/78). He then said, "no, I want to talk to my attorney." (R. 117/9).

Judge Taylor was not concerned with the Defendant's detention. He referred to it as being "of no consequence." (R. 117/25). Judge Taylor took the matter under advisement, but it was only to consider the constitutional issues surrounding the warrant that was issued by the Board of Pardons. (R. 117/25-28).

The trial judge issued a written decision. In the written decision the Court found that the Defendant lived in Utah but was driving an out-of-state vehicle and he was unable to give the full name of the owner of the vehicle. The Court found that based on these facts, the officer did a license and warrant check on the Defendant and that these actions were professionally responsible and constitutionally permissible. (R. 041).

SUMMARY OF ARGUMENTS

The Defendant was detained when Officer Dixon took his driver's license and ran a warrants check on him. Officer Dixon detained the Defendant without being able to point to specific articulable facts that would lead a reasonable person to believe that the Defendant was engaged in criminal activity. Since the Defendant was illegally detained, the evidence which was found following said detention should have been suppressed by the trial court.

ARGUMENT

**THE DEFENDANT WAS DETAINED WITHOUT REASONABLE
SUSPICION WHEN OFFICER DIXON TOOK HIS DRIVER'S
LICENSE AND RAN A WARRANTS CHECK ON HIM.**

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. Even though the

Defendant was not driving his vehicle at the time of his detention this case is analogous to a regular traffic stop.

Before a police officer can detain a citizen he needs an articulable suspicion “that the person has committed or is about to commit a crime;” *State v. Markland*, 84 P.3d 240, 241 (Utah Ct. App. 2004). The State has the burden of establishing those articulable facts. *See, State v. Kohl*, 999 P.2d 7, 12 (Utah 2000).

In determining whether an officer has reasonable suspicion, courts should “look to the totality of the circumstances . . . to determine if there was an objective basis for suspecting criminal activity.” *State v. Humphrey*, 937 P.2d 137, 141 (Utah Ct. App. 1997). When considering the totality of the circumstances the officer’s conduct should be judged “in light of common sense and ordinary human experience . . . and we accord deference to an officer’s ability to distinguish between innocent and suspicious actions.” *United States v. Williams*, 271 F.3d 1262, 1268 (10th Cir. 2001).

Reasonable suspicion must also be judged against an objective standard. This Court must consider “whether there were specific and articulable facts known to the officer, which taken together with rational inferences from these facts, created a reasonable suspicion of criminal activity to justify intrusion into the defendant’s personal security.” *State v. Friesen*, 988 P.2d 7, 10 (Utah Ct. App. 1999).

In the case at bar, the encounter between Officer Dixon and the Defendant started out as a level one encounter. A level one encounter “is a voluntary encounter where a citizen may respond to an officer’s inquiries but is free to leave at any time.” *State v. Jackson*, 805 P.2d 765, 767 (Utah Ct. App. 1990).

Defendant was parked on the side of the road trying to fix his dashboard lights when Officer Dixon pulled his vehicle behind the Defendant’s truck to see if he was okay and if he needed help. (R. 117/4). Officer Dixon had not observed any violations of the law. (R. 117/3). During the encounter Officer Dixon asked Defendant where he was from and the Defendant answered, “Huntsville.” Officer Dixon had noticed that the truck had Iowa plates so he asked the Defendant who owned the truck. (R. 117/5).

Defendant initially told Officer Dixon that he didn’t know and then told him the truck was a friend’s and that he was letting him use it. (R. 117/5). On cross-examination, Officer Dixon testified that he couldn’t remember what the Defendant had told him. The following colloquy took place between Defendant’s attorney and Officer Dixon.

Q. And when he gives you his name and tells you he lives in Huntsville, what other facts do you have to believe the vehicle is stolen at that time?

A. Well, he didn't know, couldn't tell me who the registered owner was.

He wouldn't tell me his exact friend's name.

Q. Did he tell you his first name?

A. I don't remember.

Q. Did he tell you the phone number to verify who the owner was?

A. I don't remember.

Q. He could have done that, right?

A. Possibly.

(R. 117/10). At this point, the level one encounter escalated to a level two detention. Officer Dixon asked the Defendant for his driver's license and the registration to the vehicle so he could "make sure that everything with the truck was okay." (R. 117/5). The Defendant couldn't find the "paperwork" on the vehicle and only gave Officer Dixon his driver's license. (R. 117/6). Officer Dixon had the Defendant wait in his vehicle while he ran a check for warrants. He also ran an NCIC check on the vehicle. Officer Dixon learned that the vehicle wasn't stolen, but that the Defendant had a warrant for his arrest. (R. 117/6).

It is well settled that when an officer takes an individual's identification and runs a warrants check that a detention has occurred. In *State v. Ray*, 998 P.2d 274 (Utah Ct. App. 2000), this Court addressed a situation where two officers were engaged in a level one encounter with the defendant. One of the officers took the

defendant's identification and ran a warrants check. While the officer was running the warrants check, the second officer continued to question the defendant and asked for consent to search her bag. During the search of the bag the officer found paraphernalia. *Id.* at 276. This Court stated that;

Given the totality of the circumstances, it is clear that a reasonable person in Ray's position would not feel free to just walk away, thereby abandoning her identification, let alone to approach Officer Eldard, take back her identification, and then leave. Instead, Officer Eldard's retention of her identification during the warrant check sufficiently restrained Ray's freedom that she was seized for purposes of the Fourth Amendment.

Id. at 278. When the encounter turned to a level two detention, Officer Dixon is required to be able to point to specific articulable facts to support the detention. "In determining whether this objective standard has been met, the focus necessarily centers upon the facts known to the officer immediately before the stop." *State v. Friesen*, 988 P.2d at 10.

In the case at bar, Officer Dixon knew that Defendant lived in Huntsville, Utah, but that he was driving a car that had Iowa plates on it. Officer Dixon testified that the Defendant originally told him that he didn't know who the truck belonged to and then said it was a friend's. However, Officer Dixon couldn't remember if Defendant gave him a name and phone number of the friend who owned the car. Also, when Officer Dixon asked for the Defendant's driver's

license and registration the Defendant was not able to produce the registration for the vehicle.

Based on the above facts, Officer Dixon detained the Defendant so he could “make sure everything was okay with the car.” (R. 117/5). If Officer Dixon was really concerned that the truck was stolen he could have very easily and non-intrusively given dispatch the license number and had dispatch do a NCIC check to see if it was stolen. Instead, he detained the Defendant and ran a warrants check on him.

Under the totality of the circumstances, Officer Dixon did not have reasonable suspicion to detain the Defendant. In *State v. Johnson*, 805 P.2d 761 (Utah 1991), the Supreme Court reversed the decision by this Court in *State v. Johnson*, 771 P.2d 326 (Utah Ct. App. 1989). In *Johnson*, a deputy sheriff noticed a vehicle with faulty brake lights. Before he stopped the vehicle he ran a check on the license plate and obtained the name of the registered owner. When the deputy stopped the vehicle he asked the driver for her driver’s license. The name on the license was different than that of the registered owner. The deputy asked for registration and the driver was unable to produce the registration. The deputy then asked the defendant, who was a passenger, for identification, reasoning that with no registration and no owner present, there was a possibility that the car was stolen. *Id.* at 762

The deputy returned to his car and ran a warrants check on the two occupants of the car. The defendant had a warrant for her arrest. She was arrested and her backpack was searched, producing paraphernalia and amphetamines. *Id.*

The Utah Supreme Court stated that “[w]hile the lack of a registration certificate and the fact that the occupants did not own the car raised the possibility that the car might be stolen, this information, without more, does not rise to the level of an articulable suspicion that the car was stolen.” *Id.* at 764. The Supreme Court then quoted from Judge Orme’s dissent where he stated that the “facts are just as consistent with the more likely scenario that the driver borrowed the car from its rightful owner.” *Id.* (quoting, *State v. Johnson*, 771 P.2d at 328(dissenting opinion)).

The Supreme Court noted that the deputy could have inquired about the registered owner and how the occupants came into possession of the car. He also did not check stolen car records to ascertain if the car had been reported stolen, nor did he know of a report of a stolen vehicle matching that description. “Therefore, the leap from asking for the passenger’s name and date of birth to running a warrants check on her severed the chain of rational inference from specific articulable facts and degenerated into an attempt to support an as yet ‘inchoate and unparticularized suspicion or hunch.” *State v. Johnson*, 805 P.2d at 764 (quoting, *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

The only possible distinguishing fact between *Johnson* and the case at bar is that Officer Dixon testified that Defendant initially said he didn't know who the truck belonged to and then said it was a friend's. (R. 117/5). However, when pressed the officer couldn't remember whether the Defendant had given him a name and phone number for the owner. (R. 117/10). The State has the burden for establishing the articulable factual basis. Here, Officer Dixon was clearly unable to do that.

As was the case in *Johnson*, Officer Dixon could have attempted to obtain more information about the owner and he could have looked at the license plate and ran an NCIC check to see if the vehicle was stolen. Instead, he took the Defendant's driver's license and ran a warrants check on him. This step severed the "chain of rational inferences from specific and articulable facts and degenerated into an attempt to support an . . . inchoate and unparticularized suspicion or hunch." *State v. Johnson*, 805 P.2d at 764.

The State failed to meet its burden of showing specific articulable facts that justified detaining the Defendant. For these reasons the Defendant respectfully requests this Court to reverse the trial court's denial of his motion to suppress the evidence.

CONCLUSION

Officer Dixon escalated the level-one encounter into a level two detention when he took the Defendant's license and ran a warrants check on him. Since Office Dixon was unable to point to specific and articulable facts that would lead a reasonable person to believe the vehicle was stolen. The contraband was found following this illegal detention and therefore should have been suppressed as fruit of the poisonous tree.

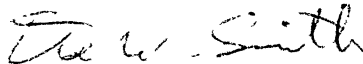
DATED this 15th day of November, 2004.



DEE W. SMITH
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Brief of Appellant to Mark Shurtliff Attorney General, Attorney for the Plaintiff, 160 East 300 South; 6th Floor PO Box 140854 SLC, Utah 84114-0180, postage prepaid this __ day of November, 2004.



DEE W. SMITH
Attorney at Law

ADDENDUM

ADDENDUM A

SECOND DISTRICT COURT

2002 JAN -4 P 4: 26

SECOND DISTRICT COURT - OGDEN COURT
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH,	:	AMENDED
Plaintiff,	:	MINUTES
	:	JURY TRIAL
	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 011903622 FS
	:	
BRENT W TIMMERMAN,	:	Judge: STANTON M. TAYLOR
Defendant.	:	Date: November 20, 2001

PRESENT

Clerk: pama

Prosecutor: RICHARD A PARMLEY

Defendant

Defendant's Attorney(s): PDA, MARTIN GRAVIS

DEFENDANT INFORMATION

Date of birth: June 16, 1960

Video

Tape Number: T112001 Tape Count: 9:15

CHARGES

1. ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE - 2nd Degree Felony
Plea: Not Guilty - Disposition: 11/20/2001 Guilty
2. USE OR POSSESSION OF DRUG PARAPHERNALIA - Class B Misdemeanor
Plea: Not Guilty - Disposition: 11/20/2001 Guilty

TRIAL

This is the time set for jury trial. Attorney Richard Parmley is present representing the State of Utah. Attorney Martin Gravis is present representing the defendant, Brent W. Timmerman, who is present.

Jury vore dire is held. Jury is selected.

Parties make opening statements.

State presents its case by calling witnesses Justin Dixon, Shawn Groger, Christine Wright, and Tersa Malmberg. Witnesses are sworn and testify.

State rests. Defense does not call any witnesses. Defense rests. Jury instructed. Closing arguements made by each party. Jury

Case No: 011903622
Date: Nov 20, 2001

retires.

Jury returns with a verdict of guilty to both charges. Jury is thanked and released.

Court has bifurcated the issue of defendant beening previously convicted of a felony. State presents a certified copy of previous conviction.

Defendant waives the time for sentencing and requests to be sentenced today.

SENTENCE PRISON

Based on the defendant's conviction of ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

To the WEBER County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

The prison sentence imposed on count I is to run concurrently to the jail sentence imposed on count II but is to run consecutively to the prison sentence the defendant is now serving.

SENTENCE JAIL


Based on the defendant's conviction of USE OR POSSESSION OF DRUG PARAPHERNALIA a Class B Misdemeanor, the defendant is sentenced to a term of 180 day(s)

Case No: 011903622
Date: Nov 20, 2001

SENTENCE JAIL SERVICE NOTE

The jail sentence imposed on count II in this case is to be served at the Utah State Prison. The jail sentence may run concurrently to the prison sentence imposed on count I but consecutively to the prison sentence the defendant is now serving.

Dated this 14 day of Dec, 2001.


STANTON M. TAYLOR
District Court Judge

ADDENDUM B

IN THE SECOND JUDICIAL DISTRICT COURT
OGDEN COURT, WEBER COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 011903622 FS
	:	
Plaintiff,	:	
	:	
v	:	
	:	
BRENT W. TIMMERMAN,	:	
	:	
Defendant.	:	

SUPPRESSION HEARING OCTOBER 16, 2001

BEFORE

THE HONORABLE STANTON M. TAYLOR

SECOND JUDICIAL DISTRICT COURT
2002 MAR 27 P 2:42

FILED

Utah County of Appeals

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER

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Sandy, Utah 84092
801-523-1186

Pauline Stagg
Clerk of the Court

2001/022CA

ORIGINAL

APPEARANCES

For the Plaintiff:

RICHARD A. PARMLEY
Deputy County Attorney

For the Defendant:

MARTIN GRAVIS
Public Defender Association

* * *

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WITNESS

JUSTIN DIXON

Direct Examination by Mr. Parmley

1

Cross Examination by Mr. Gravis

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1 WEBER COUNTY, UTAH; OCTOBER 16, 2001
2 HONORABLE STANTON M. TAYLOR PRESIDING
3 P R O C E E D I N G S

4 THE COURT: State vs. Timmerman. Is the State ready
5 to proceed?

6 MR. PARMLEY: Yes, Your Honor, and we apologize for
7 the lengthy wait. We called Officer Dixon's home. He had been
8 subpoenaed. We have a copy of the subpoena in our file. We
9 called his home. He worked graveyards, was asleep but never
10 received the subpoena through OPD. We apologize. They're
11 routed through OPD and we don't know what happened but he is
12 here now and I'm sorry for the wait.

13 THE COURT: It's all right.

14 MR. PARMLEY: Officer Dixon?

15 JUSTIN DIXON
16 having been duly sworn testified upon
17 his oath as follows:

18 DIRECT EXAMINATION

19 BY MR. PARMLEY:

20 Q Officer Dixon, will you tell us your full name
21 please?

22 A Justin Dixon.

23 Q And you work with the Ogden Police Department; is
24 that right?

25 A Yes.

1 Q What is your assignment with the Ogden Police
2 Department?

3 A I work on the graveyard patrol shift.

4 Q Were you on duty on August 1st of this year?

5 A Yes.

6 Q And will you tell us about 3:00 or 3:15 in the
7 morning, where you were?

8 A I was out in the area of Pennsylvania Avenue and 2550
9 South.

10 Q Did you in that area see a truck that caught your
11 attention?

12 A Yes, I did.

13 Q What was it about this truck that drew your attention
14 to it?

15 A It was pulled to the side of the road. It didn't
16 have any lights on and the driver door was open and the driver
17 was kind of half hanging out like he was working on something
18 under the dash.

19 Q Where was the truck on the road?

20 A It was on the 24th Street I-15 ramp which is right
21 there at 2550 South Pennsylvania.

22 Q Is this a traveled portion of roadway where you saw
23 the vehicle or was it off to the side?

24 A It was off to the side.

25 Q Lights out, vehicle stopped, driver door open, driver

1 sort of hanging out the side of the car you said or out of the
2 side of the truck. Could you see if the truck was running or
3 if it was shut off?

4 A I couldn't tell.

5 Q You were in your patrol car at this time; is that
6 right?

7 A Yeah.

8 Q And were you coming from behind or from the other
9 direction?

10 A I was driving south on what's Pennsylvania Avenue.
11 So when I stopped at the stoplight and the occupants of the
12 vehicle were to my left.

13 Q All right and then you turned onto the on-ramp
14 yourself?

15 A Uh-huh (affirmative).

16 Q Now were you - tell us exactly how you approached on
17 the on ramp, what it is you did.

18 A As soon as the light turned green I turned and pulled
19 right behind the vehicle. I didn't turn on any lights other
20 than my headlights were on. I just pulled up behind it.

21 Q At that point had you seen any violations of law or
22 anything?

23 A No.

24 Q Okay. So you pulled up from behind the vehicle and
25 came to a stop?

1 A Yeah.

2 Q How close to the back of the truck did you park your
3 patrol car?

4 A From probably me to you.

5 Q Now were your headlights on?

6 A Yes.

7 Q Did you shut them off or did you leave them on?

8 A No, I had them on and I'm sure I had the brights on.

9 Q Okay. But you didn't activate any overhead lights or
10 anything?

11 A No.

12 Q On the on ramp, if the vehicle had wanted to go
13 forward at that point, was there anything blocking their
14 ability to drive forward?

15 A No.

16 Q Please tell us exactly what you did after you had
17 brought your patrol car to a stop behind the truck.

18 A I let the dispatcher know where I was and I let her
19 know that I was out on a vehicle that was pulled over to the
20 side of the road.

21 Q What were you going to do at that point?

22 A Just see if they were okay, see if they needed any
23 help.

24 Q And how did you proceed from that point?

25 A I just got out of my car, I walked up to the driver

1 which was Brent Timmerman. I asked him if he was okay and what
2 was wrong. He said that his dashlights had just went out and
3 when I got up there, I could see that he was messing with the
4 wires or the fuse box under the dashboard. He told me that his
5 lights were out. When I'd approached the car I noticed it had
6 Iowa license plate on it so I asked him where he was from and
7 he said Huntsville. I knew Huntsville was just up in the
8 valley there so I asked him who the truck belonged to and at
9 first he said he didn't know and then he said it was a
10 friend's.

11 Q You saw the Iowa plates, he said he was from
12 Huntsville, so you asked him at that point who the truck
13 belonged to?

14 A Yes.

15 Q And what was the reason for asking that?

16 A Because I was wondering what the deal was with the
17 truck since it was registered out of Iowa and he lived in
18 Huntsville.

19 Q What did he say?

20 A Eventually he told me that it was a friend's, a
21 friend had bought it from a lady and the friend was letting him
22 use it. So then I asked him if I could see his driver's
23 license and the registration to the vehicle to make sure that
24 everything with the truck was okay.

25 Q Now what did the defendant say to you?

1 A He couldn't find no paperwork on the vehicle and he
2 gave me his driver's license.

3 Q Did you do any further checks to confirm or dispel
4 your concerns about that vehicle with Iowa plates?

5 A Yeah, at that time I asked him to stay in the vehicle
6 because he had some screwdrivers and some other things that he
7 was working with so I went back to my vehicle and checked with
8 dispatch and they said that he had a warrant for a felony two,
9 no-bail warrant and his license was valid.

10 Q So you verified he had a valid license but there were
11 two felony two warrants for his arrest?

12 A Well, it was just a felony two warrant.

13 Q A felony two warrant for his arrest. Did you learn
14 anything about the vehicle with the Iowa plates?

15 A I learned that it wasn't stolen. It was registered
16 to a lady named Jeanine out of Iowa. It wasn't reported
17 stolen.

18 Q The name of the registration papers were with the
19 vehicle you said?

20 A Yeah.

21 Q What did you do once you had learned those three
22 things?

23 A About this time another officer showed up and I went
24 up and I placed him under arrest for the warrant and brought
25 him back and put him in my car.

1 Q After you had arrested him on the warrant, what did
2 you do with the vehicle?

3 A I had the other officer search through it incident to
4 arrest and also do an inventory on the vehicle before we
5 impounded it and held it for safe keeping.

6 Q Does OPD have an impound policy?

7 A Yes.

8 Q Did you follow the inventory and impound policy in
9 impounding this vehicle?

10 A Yes.

11 Q Are these circumstances which you would typically
12 impounded the vehicle?

13 A Yes.

14 Q What happened in the course of the search incident to
15 arrest and the impound and inventory of the vehicle?

16 A Officer Grogen found three small baggies which field
17 tested positive for methamphetamine, also found some burnt
18 glass pipes and a plastic scale.

19 Q Where were those items found?

20 A On the seat, on the middle of the seat.

21 Q Now, was anybody else in the vehicle besides the
22 driver, defendant?

23 A Yes, one passenger, Amy Holtz, I think was her name.

24 Q Did you have any discussion with the passenger or the
25 defendant after you'd found the baggies of suspected

1 methamphetamine and the pipes?

2 A Yes. I talked to Amy. I asked her about the meth
3 and the paraphernalia. She said that it wasn't hers. I
4 returned to my patrol car where I advised Mr. Timmerman his
5 Miranda rights and then I told him that we had found the meth
6 and paraphernalia.

7 Q After you had advised him of his rights, did you ask
8 him if he wanted to talk with you?

9 A Yes. He said he would talk to me and he said he
10 understood them.

11 Q And what did you say at that time?

12 A Then I let him know that we had found some
13 methamphetamine and paraphernalia, that if they were his, he
14 needed to let me know so maybe he didn't get charged with this
15 stuff.

16 Q Did he say anything in response to that?

17 A He said that they were his, if she doesn't get
18 charged. Then he said, no, I want to talk to my attorney.

19 Q Okay. What was, was they're mine if she doesn't get
20 charged?

21 A Say that again.

22 Q What were his words exactly?

23 A I'd have to look in my report.

24 Q All right. Is that the report that you're referring
25 to?

1 A Yes.

2 Q Okay. Does that refresh your memory?

3 A He said if she didn't get charged, then it's mine and
4 then he said, no, I want to talk to my attorney.

5 Q Okay. Was there any further questions at that time?

6 A No.

7 MR. PARMLEY: That's all I have thank you.

8 CROSS EXAMINATION

9 BY MR. GRAVIS:

10 Q So you told him that if he said it was his, she
11 wouldn't get charged, otherwise they were both getting charged,
12 right?

13 A No. I said if it wasn't hers then he should let me
14 know so she didn't get charged with his stuff.

15 Q With his stuff? So you had implied that he was going
16 to get charged irregardless of whether she got charged, right?

17 A If you take it that way.

18 Q Did you tell him it would be a shame if she got
19 charged, she was a cute little girl?

20 A No.

21 Q Okay. You see the vehicle stopped and he's obviously
22 working on it. He gave you his name and told you where he
23 lived, correct?

24 A Yeah.

25 Q Had you run the plates before?

1 A No.

2 Q Did you have any reasons to believe the vehicle was
3 stolen at that time?

4 A What time?

5 Q When you first pulled off and you see it's got Iowa
6 plates on it?

7 A No.

8 Q And when he gives you his name and tells you he lives
9 in Huntsville, what other facts do you have to believe the
10 vehicle is stolen at that time?

11 A Well, he didn't know, couldn't tell me who the
12 registered owner was. He wouldn't tell me his exact friend's
13 name.

14 Q Did he tell you his first name?

15 A I don't remember.

16 Q Did he tell you the phone number to verify who the
17 owner was?

18 A I don't remember.

19 Q He could have done that, right?

20 A Possibly.

21 Q If he had done that, would you have called the person
22 before you called dispatch?

23 A I would have probably had dispatch do it all at the
24 same time.

25 Q All right, all at the same time. But you don't

1 remember whether or not he even told you that, correct?

2 A If he told me his first name and last name and phone
3 number?

4 Q First name and phone number, not a last name but a
5 first name and phone number.

6 A I don't remember.

7 Q Okay. Now, at that point in time you say you never
8 got the registration. Did you ask for the registration?

9 A Yeah.

10 Q Did you look in the glove box for it?

11 A He looked around. He couldn't find no paperwork on
12 the car.

13 Q You're sure about that. Was paperwork found in the
14 vehicle?

15 A No.

16 Q Did you do the inventory search or did someone else?

17 A Officer Grogen did.

18 Q And you testified it was done according to Police
19 Department Policy and Procedures. How do you know that?

20 A 'Cause Officer Grogen did it.

21 Q Well, Officer Grogen did it, not you, correct?

22 A Yeah.

23 Q So you don't know if he followed policies and
24 procedures or not, do you?

25 A Yeah, he did.

1 Q How do you know that?

2 A 'Cause all you gotta do is fill out the paperwork
3 which he filled out the vehicle information and he gave it to
4 me -

5 Q Where is the vehicle information?

6 A It's with the case report.

7 Q What vehicle information did he fill out?

8 A It's the state tax slip on the top it will say For
9 Safe Keep.

10 Q State tax slip and then is there another paper? Is
11 there also paperwork done by the Police Department Impound
12 Inventory sheet?

13 A No. It's all on the - that's it. It's on the state
14 tax slip.

15 Q Do you have a copy of the state tax slip?

16 A No.

17 Q That's suppose to go with the case report, right?

18 A Yeah.

19 Q And you're saying that's been filled out and
20 submitted?

21 A Yes.

22 Q And you're sure about that? If I go to the police
23 department, that will be there today?

24 A Yeah.

25 Q Okay. Now, you asked for Mr. Timmerman's driver's

1 license. He provided you a Utah driver's license, correct?

2 A Correct.

3 Q And you verified he was the same person on there,

4 right?

5 A Yes.

6 Q And then when you went back to your car, you took his

7 driver's license with you, correct?

8 A Yes.

9 Q So at that point in time, he wasn't free to go?

10 A If he wanted to leave he wouldn't have his driver's

11 license.

12 Q Yeah, and then you'd have pulled him over because he

13 didn't have a driver's license, right?

14 A No.

15 Q It's illegal to drive without a valid Utah driver's

16 license, correct?

17 A Correct.

18 Q And since you had it, he really couldn't leave,

19 correct?

20 A He could have.

21 Q Okay. Now you ran warrant checks on him too,

22 correct?

23 A Yes.

24 Q Did you check on the car?

25 A Yes.

1 Q Did you do that before you ran a warrants check?

2 A I had dispatch do it at the same time.

3 Q And you determined there was a warrant issued by

4 Adult Parole and Probation, correct?

5 A Yes.

6 MR. GRAVIS: Okay. I have nothing further.

7 MR. PARMLEY: No other questions, Your Honor.

8 THE COURT: You may step down sir. Thank you.

9 Anything else?

10 MR. PARMLEY: No, Your Honor.

11 THE COURT: Mr. Gravis?

12 MR. GRAVIS: Nothing, Your Honor.

13 THE COURT: Did you wish to address your case, Mr.

14 Parmley?

15 MR. PARMLEY: It's Mr. Gravis' motion so perhaps I

16 should -

17 MR. GRAVIS: State's burden.

18 MR. PARMLEY: Then I would like to address it myself.

19 THE COURT: Okay.

20 MR. PARMLEY: I would agree with the defense's brief

21 that there would be a problem in this case if Officer Dixon's

22 initial approach to the defendant's truck constituted a

23 detention, level two encounter. However - and the reason for

24 that, of course, is that Officer Dixon did not observe any

25 violation of the law when he first saw the defendant. However,

1 he did see what looked to him like somebody in distress at the
2 side of the road and they need help. Officer Dixon then pulled
3 his vehicle over to the highway that the defendant was on and
4 drove to some distance behind the defendant and merely stopped
5 his patrol vehicle, did not activate his overhead lights or do
6 anything that would cause the person in the vehicle that he's
7 approaching to feel that they were being detained for a
8 violation of law. In fact, they were not. Officer Dixon then
9 simply walked up to the vehicle. Now he had observed this
10 vehicle have Iowa plates but his purpose in walking up to the
11 vehicle was to see if he could help him, to find out what was
12 the matter with the truck, why he was stranded at the side of
13 the road and in the course of that, simply talked with him
14 about the problem he was having with the fuses, the lights had
15 gone out, asked him who the truck belonged to because he had
16 seen the Iowa plates, asked the defendant where he lived.

17 The defendant at that time told Officer Dixon that he
18 lived in Huntsville, didn't know who the truck owner was and
19 Officer Dixon at that point, was beginning to have some
20 suspicions about the registration and identity of the owner of
21 the vehicle. And at that point, Your Honor, Officer Dixon did
22 the prudent thing and asked if there was registration papers
23 with the vehicle. When the defendant couldn't produce any
24 papers, then Officer Dixon had reasonable suspicion that there
25 was something wrong with the registration of the vehicle, that

1 the defendant may not be a legitimate possessor of the vehicle
2 and at that point had a duty as a peace officer to confirm or
3 dispel his suspicions.

4 Now at that point, this did change to a level two
5 encounter and he asked the defendant if he could see his
6 driver's license and went back to his patrol vehicle where he
7 asked dispatch to run an NCI check on the vehicle, a driver's
8 license check for the defendant and a warrant's check for the
9 defendant and in the process, discovered that the vehicle was
10 not stolen, that the defendant did have a driver's license, but
11 there was a warrant for his arrest.

12 I don't think that Officer Dixon should have
13 proceeded any differently than he did once he had seen the Iowa
14 plates, heard some not particularly reasonable explanations
15 about what the defendant is doing in possession of the car
16 because he lives in Huntsville and doesn't know who the owner
17 is and has no papers for the vehicle. The facts that there are
18 no papers with the vehicle, itself constitutes a violation of
19 law that Officer Dixon had a duty to pursue. So I think that
20 Officer Dixon did through that point was absolutely as he
21 should have.

22 Once he had discovered the warrant of arrest, he was
23 duty bound as an officer of the law and an officer of the
24 courts to affect an arrest. Once he's affected the arrest, he
25 has the right to search the defendant incident to the arrest,

1 his person and the passenger compartment of the vehicle. They
2 did that. They also impounded and inventoried the vehicle.
3 Even if there had been a problem with the impound or inventory,
4 they had the right to have searched the passenger compartment
5 incident to arrest in any event. They did that. They found
6 the suspected controlled substance.

7 The last part of the argument the defense makes is
8 that after Miranda, the defendant's statement to Officer Dixon
9 about the methamphetamine, that statement should be suppressed
10 because it was the product of coercion. Under the law that the
11 Court consider the totality of the circumstances, I think that
12 *it's apparent here that there was some appeal to the defendant*
13 *to be cooperative and to be honest.* In fact, the Officer's
14 testimony is that he told the defendant that if it was his he
15 should tell me so that she didn't get charged for his stuff. I
16 think those were his exact words, so that she didn't get
17 charged for his stuff. I think that's an appeal to one's
18 conscience, but I don't think that under the totality of the
19 circumstances that's excessive, that it's offensive, that it's
20 egregious conduct on the part of the police that amounts to
21 coercive, unfair tactics to induce a person to admit something
22 that they would not otherwise have talked about. It was a very
23 simple appeal to cooperate with them and own up to it if it's
24 his so that she doesn't get blamed for it, at which point he
25 does make a somewhat incriminating statement and then it's

1 after that, he says, no, I want to talk to my attorney.
2 Officer Dixon at that point cuts it off entirely and says,
3 Fine. Doesn't ask another question. I think the fact that
4 Officer Dixon cuts it off so quickly at that point, goes to
5 Officer Dixon's credit and shows that Officer Dixon is very
6 cognizant of the defendant's rights under Miranda. He's also
7 respectful of the defendant's invocation of those rights when
8 it becomes clear the defendant doesn't want to talk. But
9 before that, there's nothing more than a request for the
10 defendant to cooperate and own up to something so that somebody
11 else doesn't take the fall for it if it really is his and the
12 defendant responds to that. That, under the totality of the
13 circumstances in this case, Your Honor, I don't think was
14 coercive. We ask the Court to deny the Defendant's Motion to
15 Suppress. Thank you.

16 THE COURT: Mr. Garvis?

17 MR. GRAVIS: Yes, Your Honor. First off, we feel
18 that it's a threat either you take ownership of it or we're
19 going to charge you both and we feel that's coercive. Number
20 two, the officer cannot say whether or not Mr. Timmerman told
21 him that the first name and phone number to check out who the
22 owner of the vehicle was, nor was there any evidence that the
23 registration - the State is assuming that the registration
24 under Iowa law has to be in the vehicle. There's no proof of
25 that before the Court. Just because Utah requires it, Iowa may

1 not require it and I submit the Interstate Commerce Clause
2 means that a vehicle from Iowa, if you stop a vehicle from
3 Iowa, they're not required to have registration in the vehicle,
4 they cannot be in violation of Utah law. So, when Mr. Parmley
5 argues that's a violation fo law, that's assuming facts not
6 into evidence.

7 The question is whether there's reasonable suspicion.
8 Mr. Timmerman told him his name, had a valid Utah driver's
9 license, told him where he lived, said he'd borrowed the
10 vehicle and may have told him that the person he borrowed the
11 vehicle from first name and telephone number. The officer
12 can't remember whether he did or not. We're looking at
13 reasonable suspicion and taking the totality of the
14 circumstances. The officer had no report of a stolen vehicle.
15 Mr. Timmerman was very cooperative, like I say, produced a
16 valid Utah driver's license. I would submit that at the point
17 he takes the driver's license and goes back to his vehicle with
18 it, that constitutes a detention. There is numerous Utah cases
19 that say when the officer has the driver's license and/or
20 registration that constitutes a level two stop. State vs.
21 Holmes, there's a whole series of that. I don't think the
22 State would disagree that the case law is quite clear that at
23 the point the officer has that, there's a detention, a level
24 two stop. The question is whether or not it's reasonable and
25 we submit it's not.

1 The last issue is whether or not the warrant itself
2 is valid. The warrant was issued by the Adult Parole and
3 Probation for parole violation. It is our position that
4 violates both the Fourth Amendment of the United States
5 Constitution and Article I Section 14 of the Constitution of
6 Utah says, "For seizure of the individual was not based upon
7 probably cause submitted to a neutral magistrate". The State
8 in their memorandum has argued that under Article V the
9 Separation of Power Clause, it says the State, whatever powers
10 - I'll get the exact wording here. Article V, Section 1 of the
11 Constitution says, "Additionally Article V, Section 1 of the
12 Utah State Constitution allows for the exercise of powers
13 belonging to the three state departments of government when the
14 cases are here and expressly directed or permitted." I submit
15 that if you go to Article VII Section 12 of the Utah
16 Constitution which provides the power of the Board of Pardons
17 and Paroles, it does not authorize them the power to issue
18 warrants for arrest. The legislature may have given them the
19 power but the legislature is expressly restrained by the
20 Constitution, Separate of Powers. They can give them the power
21 but whether it's constitutional or not you have to go to the
22 Constitution. The State says well, the legislature gave them
23 the power to do that. I agree. It is in the statute that they
24 have the power to issue a warrant but that does not mean it's a
25 legal warrant since the Constitution of Utah does not, under

1 their powers, does not give them the power to issue warrants
2 and even if it did, the Fourth Amendment of the Constitution
3 clearly says all people, persons shall be - their property and
4 person shall be safe from unreasonable search and seizure
5 unless there's a warrant issued based upon probable cause
6 issued by neutral and detached magistrate. Utah Legislature
7 can't overruled the United States Constitution and give the
8 parole department the power to issue warrants. Now, if it was
9 a parole Officer that picked him up, I would agree that the
10 warrant would be valid for a parole officer but the case law in
11 Utah, a recent series of cases, talk about the difference
12 between the power of a parole officer and the power of a police
13 officer.

14 In State vs. Birmingham, 10P Third 355, the Court of
15 Appeals stated that according to the Vasquez case - and I would
16 submit that probationers and parolees are treated the same
17 although probationers have a diminished Fourth Amendment right
18 as to searches by probation officers. This does not mean
19 police officers may engage in more of the search and seizures
20 as to probationers as the same basis as probation officers. I
21 submit that police officers do not have the right to arrest on
22 a board warrant the same as a parole officer would have.

23 A general warrant issued must be issued by a neutral
24 and detached magistrate. The determination of probable cause
25 is a core judicial function and to give that power to the Board

1 of Pardons to issue a general warrant not just to the parole
2 officer but to police officers, violates the Constitution,
3 violates the core judicial function of issuing a warrant.
4 There's no neutral and detached magistrate. The parole board
5 is appointed by the governor. They're not magistrates and both
6 the Fourth Amendment and Article I, Section 14 of the
7 Constitution of Utah, prohibit the arrest on a warrant unless
8 it's been issued by a neutral and detached magistrate. So,
9 we'd submit that the warrant itself is invalid, therefore the
10 arrest is invalid and the search incident to arrest is invalid.
11 Thank you.

12 THE COURT: Thank you.

13 Do you wish to respond Mr. Parmley?

14 MR. PARMLEY: Thank you, Your Honor. Just with
15 regard to the totality of circumstances giving the officer
16 reasonable suspicion to believe that something was awry, that a
17 crime may have been committed. In addition to the Iowa plates,
18 the defendant's somewhat evasive or unreasonable,
19 unsatisfactory explanations about what he was doing with the
20 car and who the owner was and in addition to the absence of
21 their being any paperwork with the vehicle, the activity of the
22 defendant when the officer pulled up, itself is suspicious and
23 gives the officer additional suspicion that this vehicle may be
24 stolen or improperly registered, that the defendant may not be
25 lawfully in possession of the vehicle. And that's that the car

1 is somewhat stranded on the side of the road, the door is open,
2 the defendant's got screwdriver or tools in there and is
3 tinkering with the fuse box. That all looks suspicious. The
4 kind of conduct that would be more likely associated with
5 somebody tampering with a vehicle that is not their own than it
6 is with an owner who is in lawful possession of their own
7 vehicle.

8 Now, as to the board warrant. 77-27-11 says that any
9 member of the board may issue a warrant based upon a certified
10 warrant request to a peace officer or other person authorized
11 to arrest, detain and return to actual custody, a parolee.
12 It's any peace officer. The defense has argued that well, it
13 wouldn't include a regular peace officer. It would have to be
14 an AP&P agent but that doesn't seem to be the way it reads at
15 all. It's a peace officer or other person authorized to arrest
16 or detain. That includes, of course, any category one peace
17 officer like an Ogden police uniform officer or patrol officer.

18 Now as to the Constitutional argument. It's
19 suggested that because the legislature has enacted this
20 provision, doesn't make any difference because it seems
21 inconsistent with the Constitution. But wouldn't the challenge
22 be that the legislative provision allowing the board to issue a
23 warrant is unconstitutional? Wouldn't that be the argument
24 that this provision is unconstitutional? It seems that if the
25 legislature has enacted that kind of provision and an officer

1 acts under that order or mandate that the statute is imposed,
2 that the arrest is nonetheless unlawful for purposes of what
3 he's doing and for purposes of his executing the search
4 incident to arrest.

5 The Legislature has also declared that a peace
6 officer can arrest on probable cause without any kind of
7 warrant at all and when a peace officer arrests on probable
8 cause without any kind of warrant at all, he can do a search
9 incident to arrest as well. It strikes me that the legislature
10 has enacted the provision. It gives the officer the authority
11 - it gives the board the authority to issue the warrant. It
12 gives the officer the duty to arrest on the warrant and at that
13 point the officer, acting in good faith and arresting on the
14 warrant, conducts the search incident to arrest as he should
15 and that a challenge to the Constitutionality of the
16 legislative grant of authority wouldn't go to the issue of
17 whether the evidence should be suppressed in any event but to a
18 Constitutional challenge of a statute that is in effect on the
19 law, on the books and this officer was simply complying with
20 the laws as they stand in the State of Utah. Again, we ask the
21 Court to deny the motion. Thank you.

22 MR. GRAVIS: In response, the officer testified he
23 had no reasonable suspicion based upon what the defendant was
24 doing out tinkering with the fuse box.

25 THE COURT: I didn't say you are entitled to a

1 response.

2 MR. GRAVIS: Your Honor, I believe I am. This is not
3 beyond a reasonable doubt, burden of proof. Besides he brought
4 up new issues in his response that I'd like to respond to. It
5 is not rebuttal. It is new issues.

6 THE COURT: I don't see any new issue.

7 MR. GRAVIS: He brought up - he started arguing the-

8 THE COURT: Just a moment Mr. Gravis. I'll be frank.
9 At this stage, the only concern I have is the Constitutional
10 argument. The rest of it, that's of no consequence.

11 MR. GRAVIS: Okay. Then I'd like to address his
12 argument that he just made on the Constitutional argument.

13 THE COURT: But you raised the argument of the
14 Constitutional argument. He was responding to what you had to
15 say.

16 MR. GRAVIS: But I still -

17 THE COURT: I'll allow you to do it briefly Mr.
18 Gravis, but you understand I'm doing it as a matter of my
19 discretion allowing you to do it, not because you have a right
20 to do it.

21 MR. GRAVIS: I'll take it for that, yes, Your Honor
22 and I'll do it very briefly. Number one, our argument that the
23 warrant was illegal addresses that the statute is
24 unconstitutional. Because the statute is unconstitutional, the
25 warrant is illegal.

1 Number two, good faith does not come into play.
2 Number one, under Utah Supreme Court has not adopted United
3 States vs. Leon under Article I Section 14 argument. Number
4 two, even if Leon was adopted, or we are on the Fourth
5 Amendment argument, good faith only applies if the warrant is
6 issued by a neutral and detached magistrate. In this case it
7 didn't happen so there's no good faith argument here. If the
8 statute is unconstitutional, they cannot save it on a good
9 faith argument. Thank you.

10 THE COURT: Okay. Interesting. So you don't think
11 you could extend Leon, assuming that the Utah Supreme Court
12 would go with it, and I agree with your analysis, I'm not aware
13 of any case where the Supreme Court has adopted the Leon
14 doctrine. Although to be candid, I think considering the
15 present composition of the court, it would be likely they
16 would.

17 MR. GRAVIS: Yes. The prior composition we may not
18 have.

19 THE COURT: That's true. With Mr. Zimmerman gone, I
20 think it's almost a foregone conclusion. But you feel like
21 that the good faith of the officer wouldn't have application
22 because of the fact that it wasn't issued by a magistrate?

23 MR. GRAVIS: Well, Your Honor, specifically sets
24 forth four factors and one of them is that the magistrate was
25 not neutral and detached. I would submit that if -

1 THE COURT: You don't think that they would extend
2 beyond that to cover that inevitability? Okay. Interesting.

3 I'm going to take the Motion to Suppress under
4 advisement. I guess I need to go back and read this and see if
5 I feel like the language (inaudible) to cover - because I think
6 it's clear in this case, Mr. Parmley, that the officer was
7 acting in good faith in enforcing the warrant. I'm not sure
8 that he would have been able to distinguish the nature of the
9 warrant to begin with.

10 MR. PARMLEY: So as I understand it, the two issues
11 the Court is still looking at are one, whether the statutory
12 provision giving the Board authority to issue a warrant is
13 unconstitutional?

14 THE COURT: Right.

15 MR. PARMLEY: Two, if it is unconstitutional, does-

16 THE COURT: If Leon is applied-

17 MR. PARMLEY: -it nullify the arrest and the
18 subsequent search?

19 THE COURT: Right. From the standpoint of his
20 investigative process, his stop, his conversations with the
21 defendant, his warrants check and so forth, I find that
22 immanently reasonable. I think he did his job. I think he did
23 what the law requires of him but that would certainly not grant
24 - that would not constitute any kind of grounds for suppression
25 of the evidence.

1 The only issue relates to the constitutionality of
2 the issuance of the warrant in the first place and the second
3 place, at least the application to his making the arrest as
4 opposed to a parole officer. And secondly, whether the good
5 faith doctrine of Leon would have application.

6 Where are we on the case?

7 MR. GRAVIS: We don't have a trial setting. We set
8 this for suppression hearing and probably - why don't we go
9 ahead and set a trial and the pre-trial and your decision as
10 soon as possible. Two week pretrial.

11 THE COURT: Yeah, let's do that. Let's go ahead and
12 set the case back on the calendar. Would you like to set a
13 trial now or should be set it for pretrial?

14 MR. PARMLEY: Let's go ahead and set the trial now.

15 THE COURT: Pardon me?

16 MR. PARMLEY: Let's go ahead and set the trial now.

17 THE COURT: Okay. How much time are we going to
18 need?

19 MR. GRAVIS: The reason we didn't set a trial on this
20 is basically we've talked to Mr. Parmley, he wanted to put this
21 (inaudible) before he even decided whether or not it would
22 (inaudible) the suppression. So we didn't set a trial date.
23 We just set the suppression hearing date.

24 THE COURT: How about the 20th of November for a
25 trial?

1 MR. GRAVIS: That would be fine.

2 THE COURT: Would that work for the State, Mr.

3 Parmley?

4 MR. PARMLEY: It should.

5 THE COURT: And then put it back on both for decision

6 on the motion under advisement and pretrial on say November 5th

7 and I may very well have decided it before then.

8 MR. PARMLEY: Why don't we set it on the 29th. That's

9 two weeks.

10 THE COURT: That would be fine. Okay.

11 MR. GRAVIS: 2:00 on that?

12 THE COURT: Yeah, 2:00 P.M.

13 MR. GRAVIS: Thank you, Your Honor.

14 THE COURT: Thank you.

15 (Whereupon the hearing was concluded)

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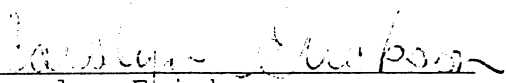
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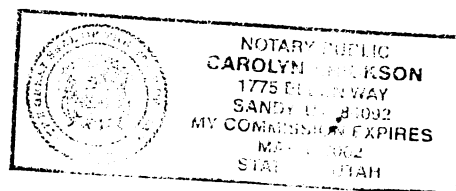
CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearing held before Judge Stanton M. Taylor was transcribed by me from a videotape and is a full, true, and correct transcription of the proceedings as set forth in the preceding pages to the best of my ability.

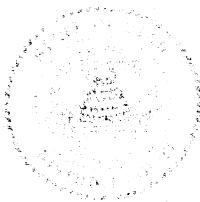
Signed this 23rd day of March, 2002 in
Sandy, Utah.


Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2002



ADDENDUM C



SECOND DISTRICT COURT

Second District Court

19 P 4: 25

Judge Stanton M. Taylor

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

State of Utah,

Petitioner,

vs.

Brent W. Timmerman,

Respondent.

Memorandum Decision

Case No. 011903622

The defendant has filed a motion to suppress evidence seized by an officer after the officer had observed the defendant pulled over to the side of the road on the ramp onto the freeway off 24th Street in Ogden.

The officer stopped to see if the defendant needed assistance. Ultimately, because of an out-of-state vehicle being driven by an in-state driver who was unable to give the full name of the owner of the vehicle, the officer did a license and warrant check on the defendant. The check revealed a current Board of Pardons Warrant. A subsequent search of the vehicle, based both upon the arrest and an inventory required when impounding a vehicle, revealed the contraband out of which these charges arose.

The Court finds factually the conduct of the officer during the incident was both professionally responsible and constitutionally permissible. The only issue of note and the reason I took the motion under advisement relates to whether the legislative grant of power to a police officer to serve warrants issued by the Board of Pardons is violative of the constitution of

both Utah and the United States.

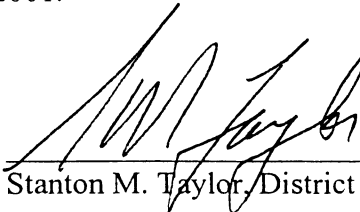
It is clear that the Appellate Court of this state has upheld grants of power to both the Courts and the Board of Pardons to issue warrants. It is just as clear that the basis for the issuance of warrants differs between the two groups. The powers of the Courts and the Board are separate and distinctive and not violative of the constitutional separation required.

The fact that the legislature has chosen--in its enumeration of powers of peace officers--to allow them to serve both types of warrants is not violative of their discretion. Arrest is an executive function in either situation and would not contravene constitutional strictures.

Even assuming problems relating to the constitutional issues raised above, I would find the officer was relying reasonably upon the validity of the warrant issued and refuse to suppress based upon "Leon" and its progeny.

For the reasons stated, the motion to suppress is hereby denied.

DATED this 18 day of October, 2001.


Stanton M. Taylor, District Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 011903622 by the method and on the date specified.

METHOD NAME

Mail	MARTIN V GRAVIS ATTORNEY DEF 2568 WASHINGTON BLVD. OGDEN, UT 84401
Mail	RICHARD A PARMLEY ATTORNEY PLA 2380 WASHINGTON BLVD. 2ND FLOOR OGDEN UT 84401

Dated this 20th day of October, 2001.

MKE Dixon
Deputy Court Clerk